IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-854

MARK SAMUEL BERGER,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant Attorney General

DON A. LANGHAM
First Assistant Attorney General

JOHN C. WALDEN
Senior Assistant Attorney General

SUSAN V. BOLEYN
Assistant Attorney General

Please serve:

SUSAN V. BOLEYN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3397

I N D E X

TABLE OF AUTHORITIES

(cites continued)

Statutes Cited

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QUESTION PRESENTED

Whether Petitioner's rights under the Fourth Amendment were violated by the seizure of marijuana, in plain view, obtained by a hotel security officer during a routine check of a misplaced suitcase in order to determine ownership?

PART ONE

STATEMENT OF THE CASE

Petitioner, Mark Samuel Berger, was convicted of violating the Georgia Controlled Substances Act in the Superior Court of Fulton County, Georgia. Petitioner filed a pretrial motion to suppress, alleging that the search of his briefcase, which he had misplaced, by security officers at the Hyatt Regency Hotel in Atlanta, Georgia violated his rights under the Fourth Amendment. Following a hearing, Petitioner's motion to suppress was denied by the Superior Court of Fulton County, Georgia on November 3, 1978. Petitioner then pursued an interlocutory appeal to the Court of Appeals of Georgia alleging as error the denial of his motion to suppress the evidence recovered during the search of his briefcase.

The Court of Appeals of Georgia in its review of the case in Petitioner's interlocutory appeal made pursuant to Ga. Code Ann. § 6-701(a)(2)(A), reviewed the evidence which was produced before the trial court in the hearing on the motion to suppress and determined that the trial court's findings crediting the security officer's version of the events leading to the search, were not "clearly erroneous" and affirmed the denial of the motion to suppress by the trial court. Petitioner's motion for rehearing was denied by the Court of Appeals of Georgia on June 5, 1979.

Subsequently, Petitioner applied for a writ of certiorari in the Supreme Court of Georgia on July 5, 1979. Petitioner's application for writ of certiorari was denied on September 4, 1979.

The petition for a writ of certiorari presently before this Court seeks review of the decision of the Court of Appeals of Georgia affirming the decision of the trial court to overrule Petitioner's motion to suppress evidence seized during a search conducted by hotel security officers. Further facts will be presented in the body of this brief relating to the conduct of the search by the security officers.

PART TWO

REASON FOR NOT GRANTING THE WRIT

THE MOTION TO SUPPRESS WAS PROPERLY OVERRULED BY THE TRIAL COURT IN ACCORDANCE WITH THE STANDARDS OF THE PLAIN VIEW DOCTRINE.

Petitioner asserts that this Court's decision in United States v. Chadwick, 433 U.S. 1 (1977) needs to be explicated to resolve whether or not the search of his misplaced briefcase was an unreasonable search and seizure in violation of the Fourth Amendment. Respondent asserts that the facts of this case fall within well-settled principles of law in the Fourth Amendment area, specifically, those cases where there is an inadvertent discovery of an incriminating object which is in plain view. The State asserts that this case is distinguishable from the facts in United States v. Chadwick, supra, and was properly held by the Court of Appeals of Georgia to be governed by such cases as Ker v. California, 374 U.S. 23 (1963), decided by this Court, cited in such Georgia cases as Brooks v. State, 129 Ga. App. 383 (1973).

Under the principles of Cooper v. California, 386 U.S. 58 (1967), the main question to be determined in cases dealing with the Fourth Amendment is whether or not under all of the circumstances of the case, the search or seizure is reasonable. In Ker v. California, 374 U.S. 23, 33 (1963), this Court stated:

> "We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in light of the fundamental criteria laid down by the Fourth Amendment and in opinions of this Court applying the Amendment."

Petitioner admits under certain circumstances, warrantless search and seizures are valid, citing United States v. Edwards, 415 U.S. 800 (1974) and Coolidge v. New Hampshire, 403 U.S. 443 (1971). Respondent asserts that the circumstances in the instant case were properly held by the Court of Appeals of Georgia to have authorized the search of Petitioner's briefcase.

The facts of the case need not be reiterated at this time as they were fully set forth in the decision of the Court of Appeals of Georgia, attached as Appendix A to Petitioner's brief. However, several facts should be stressed in evaluating Petitioner's claims. First, Petitioner's briefcase, which was unlocked, was mislaid in the lobby of the Hyatt Regency Hotel. Another person, other than the Petitioner inquired concerning the briefcase. Petitioner was unable to produce any identification, stating that his identification was inside the briefcase. The hotel manager was concerned over the large amount of money which the briefcase contained.

According to security person, W. F. Derrick, the briefcase was partially open at the time he opened the briefcase in order to get the billfold

inside to ascertain the identification of the owner of the briefcase. Officer Derrick was not attempting to search for any incriminating evidence against the Petitioner, but instead, inadvertently discovered the marijuana in plain view after opening the briefcase to locate identification for the Petitioner.

The Court of Appeals of Georgia noted, but rejected, Petitioner's claim that the principles enunciated by this Court in United States v. Chadwick, 433 U.S. 1 (1977) were applicable in the instant case, finding the two cases to be distinguishable. The differences between the facts in United States v. Chadwick, supra, and the instant case are readily apparent. In Chadwick, federal agents made a warrantless search of a locked footlocker belonging to one of the defendants and in his possession, in the federal building, approximately an hour after the defendant's arrest. The Court of Appeals of Georgia highlighted as distinguishing factors, the lack of an arrest of the Petitioner and the fact that the briefcase was not "in his possession."

It should also be noted that in United States v. Chadwick, supra, the defendants were arrested on the basis of the possibility that they were drug traffickers and the federal agents were seeking to discover incriminating evidence against the defendants by searching the double-locked footlocker. In the instant case, Petitioner was not a suspect in any crime, nor were the security officers seeking to discover incriminating evidence against the Petitioner. The Georgia Court of Appeals correctly distinguished this case from

the case cited by Petitioner as being applicable to the facts present in this case. Therefore, the privacy interest of Petitioner in his misplaced briefcase was not the same privacy interest as existed in United States v. Chadwick, supra.

Petitioner asserts that the "intrusion" into Petitioner's briefcase was illegal, as Petitioner claims his briefcase was neither abandoned nor lost, but misplaced. However, Respondent asserts that this intrusion was not only legal but mandatory based on the statutory duty, cited by the Court of Appeals of Georgia, of innkeepers to their guests concerning property which comes in the possession of the innkeepers. See Ga. Code Ann. § 52-108 and § 52-109. This statutory duty of innkeepers transforms what could be an illegal intrusion under certain circumstances, into a legal intrusion, necessary under the particular circumstances of this case.

Petitioner asserts that he had already been established as the owner of the briefcase at the time of this intrusion, but this contention is controverted by the record. Specifically controverting this contention is the fact that Petitioner was not the only person inquiring concerning the briefcase, nor could Petitioner comply with the hotel policy to produce personal identification not contained in the lost or misplaced object.

Petitioner also asserts that the intrusion was illegal as he did not consent to the intrusion. The question of consent is immaterial to an evaluation of the reasonableness of this search, as the hotel security officers were attempting

to determine the ownership of the briefcase at the time that the marijuana was discovered in plain view. The security officers needed no consent to take actions to determine the proper owner of the briefcase.

The substance in the instant case was discovered in full accordance with the plain view doctrine recognized by this Court in Coolidge v. New Hampshire, 403 U.S. 443 (1971). The plain view doctrine has been followed in many circuits, e.g., U.S. v. Mason, 523 F.2d 1122 (D.C. Cir. 1975), U.S. v. Green, 474 F.2d 1385 (5th Cir. 1973), U.S. v. Truitt, 521 F.2d 1174 (6th Cir. 1975), U.S. v. Cooks, 493 F.2d 668 (7th Cir. 1974), U.S. v. Johnson, 541 F.2d 1311 (8th Cir. 1976), U.S. v. Sedillo, 496 F.2d 151 (9th Cir. 1974).

Petitioner has asserted that the plain view doctrine is inapplicable but Respondent contends that the facts of this case fall squarely within the plain view doctrine. As the initial intrusion into the briefcase was both legal and required under the statutory duty for inn-keepers set forth in Georgia law, the first requirement for establishing a valid plain view search has been met. See Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971).

The second requirement for a valid plain view search under Coolidge v. New Hampshire, supra, is that the discovery of the evidence must be inadvertent. Coolidge v. New Hampshire, supra, at 469-470. The Court of Appeals of Georgia cited a Georgia case, Lowe v. State, 230 Ga. 134 (1973), applying the principles of Coolidge v. New Hampshire, supra. The Georgia Court of Appeals noted that in Lowe v. State, supra, a police

officer present at the scene where a house was burning was given the responsibility for keeping items in defendant's car, papers and a money bag, safe. He took and inventoried these items which he found in plain view in the car's floor. The Court of Appeals concluded that this inadvertent discovery, was devoid of any of unreasonableness outlawed by the Fourth Amendment and decisions interpreting this amendment.

The inadvertent discovery of the marijuana by the security officer in the instant case, while attempting to determine ownership of the breifcase, was similarly devoid of any unreasonable-ness. The security officer was not attempting to locate incriminating evidence to be used against the Petitioner but was instead, trying to authenticate the identity of the Petitioner as the owner of the briefcase. After having opened the briefcase wider to get the billfold out of the case, the security officer observed the marijuana in plain view inside the briefcase. There is no question that the third requirement of Coolidge, that it must be immediately apparent that the items discovered constituted evidence of a crime, was met in this case. Marijuana is immediately recognizable as a substance whose possession is illegal.

The seizure of the marijuana was clearly within the plain view doctrine as set forth in Coolidge v. New Hampshire, supra and numerous other decisions of this Court including Harris v. United States, 390 U.S. 234, 236 (1968); Ker v. California, 374 U.S. 23, 43 (1963); Frazier v. Cupp, 394 U.S. 731 (1969).

The decision of the Court of Appeals was clearly consistent with the established authority of this Court in the Fourth Amendment area and properly determined that Petitioner's constitutional rights were not violated.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioner a writ of certiorari as there was no violation of Petitioner's constitutional rights in the inadvertent discovery of marijuana by hotel security officers in attempting to discover the owner of a misplaced briefcase.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

SUSAN V. BOLEYN
Assistant
Attorney General

Please serve:

SUSAN V. BOLEYN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3397

CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent in Opposition by depositing three copies of same in the United States mail, with proper address and adequate postage to:

Mr. Edward T.M. Garland
1012 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

This 20th day of February, 1980.

SUSAN V. BOLEYN